No. 13,727

United States Court of Appeals
For the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC.,

Respondents.

BRIEF IN BEHALF OF PETITIONER.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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OPENING STATEMENT.

In this petition for review and in these review proceedings, petitioner has no quarrel with the findings of the Board that in so far as the physical aspects of the operations and services formed by Bay Area in behalf of its members, in assembling and consolidating their shipments, and arranging for the transportation thereof by air and arranging for the ultimate distribution to consignees of the members of Bay Area, the operations are not unlike those usually performed by common carrier air freight forwarders.

Petitioner, both before the Board and in these proceedings, contends that neither Consolidated Flower

Shipments, Inc.—Bay Area, herein referred to as Bay Area, nor its officers, agents and representatives, acting in pursuance of the corporate authority, are common carriers, either directly or indirectly, as defined in the Act, or as that term has been defined by our administrative bodies and interpreted and construed by our courts of law.

In this view, it is conceded that the Civil Aeronautics Board has jurisdiction, acting upon its own initiative, and pursuant to the authority vested in it by the Civil Aeronautics Act of 1938, as amended, particularly § 205(a), 401(a), 1002(b) and 1002(c), to order, conduct and conclude an investigation, pursuant to its order of investigation No. E5264, in Docket No. 4902, dated April 9, 1951 (TR p. 3).

The basis of jurisdiction of this Court is to be found in the provisions of § 106(a) and (b) of the Civil Aeronautics Act, 52 Stat. 973, 49 U.S.C. 401.

These provisions of the Act provide in part that any order issued by the Board, such as the order under review, shall be subject to review by the Circuit Court of Appeals for the Circuit where petitioner resides or has its principal place of business.

Petitioner is a California corporation, incorporated initially under the Corporations Code of the State of California, and, during the conduct of these proceedings before the Board, on October 17, 1952, reincorporated as a nonprofit cooperative association under the provisions of the Agricultural Code of the State of California, § 1190 et seq.

By order of December 29, 1951, a complaint, Docket No. 5187, by Airborne Flower and Freight Traffic, Inc., was consolidated for hearing and decision in Docket No. 4902. On this score, Airborne Flower and Freight Traffic, Inc. have likewise been named as respondents in these review proceedings. However, in so doing petitioner merely followed the established practice of naming as respondents all parties of interest in the proceedings before the Board whose decision is under review. It is notable that nowhere in the opinion or order E7139 of February 5, 1953, is there any reference to any conclusion or relief granted pursuant to such complaint and no review on such complaint is sought here by this petitioner.

It should be noted from the order of investigation (TR p. 3), and the notice of hearing (TR p. 6), two fundamental issues or questions were raised, namely, (1) to determine whether Bay Area *has engaged or is engaging* indirectly in air transportation in violation of the provisions of the Act, particularly § 401(a) thereof, or part 296 of the Board's Economic Regulations thereunder, and (2) whether the Board should issue any order of cease and desist from any such violation. We make mention of the basic issues on the order of investigation for the reason that the same will bear materially not only on the jurisdiction of the Board over Bay Area's operations, but also in the matter of the exercise of a sound discretion in the light of the record thus developed and the points and arguments hereinafter mentioned.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED ON REVIEW.

Prior to October 17, 1952, a date more specifically defined hereinafter, Bay Area was an association of growers and shippers of flowers and decorative greens, duly incorporated under the Corporations Code of the State of California, as a nonprofit association for the declared purpose in its articles (exhibits EA386, 766 and BA10) of performing a service for its members in the distribution and sale of their produce or products on the open market, in so-called eastern destination territory and in consequence of their marketing operations, move such commodity by air carrier and surface carriers to their ultimate consignee-purchasers.

This service so performed in behalf of Bay Area members, requires the assembly and consolidation and movement of such shipments in behalf of its members; the arranging for transportation by air, as well as surface carriers; and providing in their behalf, through Bay Area contract agents or local draymen, for the performance of break bulk and distribution to the respective ultimate consignee-purchaser of the shipments involved.

Bay Area does not publish any tariff, from which rates, as that term is usually applied, are projected or assessed. As indicated by the various shipping documents which exemplify this phase of the operation, the only charges assessed to the consignee or purchaser of Bay Area members, are the direct air carrier

charges, including the charges of pick-up or delivering contract draymen, or agent, plus a so-called "Bay Area advance charge" established at the time of the hearing at sixty (60) cents per box. Fifty-five (55) cents of this charge is paid by Bay Area to Airport Drayage (John C. Barulich, sole proprietor), who picks up the boxes at the members' nursery, greenhouse or shipping department and transports them by truck to the airport and terminal facility at San Francisco. Shipping documents in the name of Bay Area as consignor are prepared by office personnel employed in behalf of Bay Area under the supervision of Mr. Barulich as Executive Secretary of Bay Area.

Such shipments may move as so-called straight shipments in the name of the member of Bay Area, prepaid or collect. Depending upon marketing conditions then prevailing, and the volume of shipments available in the pool of the Bay Area membership, shipments may be consolidated into a single shipment, consigned to Bay Area's agent in destination territory, who breaks bulk and distributes to the ultimate consignee-purchasers, according to the instructions on the manifest or shipping document, prepared as aforesaid. The advance charge, based upon the number of boxes on the particular shipment for the purpose hereinabove set forth, is added to the total air transportation charges and either paid singly, in the case of an individual receiver, or pro rated according to the number of boxes delivered to each consignee-purchaser in the consolidated shipment.

A majority of the consolidated shipments (established as in excess of 68%—Bay Area Exhibit 18), move on consignment sales basis, between the Bay Area member and his receiver or purchaser, who charges back the transportation costs to him of the particular shipment by deducting such charges from the amount of the gross sales accomplished by him on the consignment. In such cases, in the last analysis, the Bay Area membership bears the transportation costs.

In the case of straight shipments in the name of the Bay Area member, consigned to the individual receiver or purchaser on a consignment basis, the member shipper again bears the transportation costs through appropriate invoices between himself and the purchaser consignee. In the few instances where straight sales are involved, F.O.B. San Francisco, the receiver bears all transportation charges including the above mentioned Bay Area advance charge.

As of the date of the hearing, approximately 750 such receivers were on the Bay Area members customer list throughout the area of this operation, which would be anywhere where served by air carriers with San Francisco Municipal Airport as origin point.

Since its initial organization, Bay Area has had from 19 to 26 members as of the date of the hearing, situated on the San Francisco Peninsula and its environs. Until the latter part of 1951, membership was conditioned upon approval and acceptance only by the Board of Directors, whether they shipped via Bay

Area or not (TR pp. 298, 243-244). At no time has the tender of any shipment or amount of shipments been made a condition precedent to initial membership or the *continued enjoyment of membership privileges* (TR pp. 297-298).

On October 17, 1952, during the pendency of the proceedings before the Board and prior to oral argument, Bay Area was reincorporated under the nonprofit cooperative association act of the State of California, pursuant to § 1190 et seq. of the California Agricultural Code. The essential distinction between such an association and the form under which Bay Area was incorporated during the conduct of the proceedings below, is, that the cooperative association is limited in its membership to producers of horticultural or farm products, such as flowers or decorative greens.

In point of time, the legal effect of such an organization, under the Agricultural Code, could not have been properly developed at the intitial hearing in this proceeding. The fact of the reorganization however, was reported to the Board at the oral argument, and more specifically was encompassed in the petition for reconsideration and rehearing and for stay of the effective date of order No. E7139, under review.

It was clearly established by testimony of the member shippers and officers and directors of Bay Area, including the other individual witnesses called by the Enforcement Attorney, that the purpose of organizing the association in the first instance was to procure a specialized truck service for the handling

of a highly perishable agricultural or horticultural commodity, such as cut flowers and decorative greens (TR p. 209), and to effect savings and economies in the cost of the transportation (TR p. 256) and to afford a more closely coordinated operation between the member shipper and the transportation agency in the handling of a highly perishable commodity such as flowers and decorative greens (TR pp. 238-290).

The operation and service is available only to members in good standing, who have qualified for membership pursuant to the Articles of Incorporation and By-Laws. Mr. Bonaccorsi, the President of Bay Area, established that the cost of the transportation has a direct bearing on the flower growing industry and that high transportation costs could drive the flower growing industry in this area out of business in so far as eastern destination territory is concerned. (TR Vol. II pp. 452-457.)

Each of the witnesses testifying in behalf of the petitioners clearly demonstrates the need for the cooperative effort in the handling of a perishable commodity, such as flowers and decorative greens, that the cost of the transportation oftentimes and for the most part determines the difference between profit and loss on the sale of these products, and that all of the members subscribe to and abide by the directions of the officers and directors which they elect to office in the Bay Area association.

It should be noted at this point that the Bay Area membership represents but a small fraction of the

total number of shippers of flowers and decorative greens in the San Francisco Bay Area.

Each member shipper assumes the risk of loss in so far as damage to his particular shipments are concerned, although the Bay Area association may assist the member in processing claims for loss and damage against direct carriers and surface carriers on the particular shipment. (Witness Zappettini, TR Vol. II pp. 504-505.)

Following the conclusion of the proceedings before the Board, Order No. E7139, in Docket No. 4902, dated February 5, 1953, the order under review was issued.

On the same day, in Docket No. 5947, the Board issued an order of investigation, Order No. 7141 (TR p. 406), to investigate the matter of renewal of part 296 of the Economic Regulations and to investigate generally the matter of indirect carriage of property. It will be seen from a reading of the order of investigation, E7141, that the status of a nonprofit cooperative association of flower shippers and growers such as Bay Area, is one of the issues under investigation, and that petitioners herein, as well as ten other shippers' associations were named as respondents in said proceeding, Docket No. 5947, which is now pending before the Board.

Also, on the same day, February 5, 1953, in Docket No. 5037, Order No. E7140 (TR p. 390) a then pending application for exemption in behalf of the petitioner herein, *was denied without prejudice* to the renewal

of such application for exemption in the investigation proceedings, Docket No. 5947. A reading of Order No. E7140, demonstrates again that Bay Area's status, either as an exempt operation within the Board's jurisdiction, or as a nonprofit shippers' association, will be considered by the Board in connection with its determination, in Docket No. 5947.

Following the issuance of the cease and desist order under review, petitioners' petition for reconsideration, rehearing or reargument and petition for stay of the effective date of order under review, pending a rehearing or reargument, or until conclusion of investigation in Docket No. 5947 above mentioned, or until the final disposition of said application for an exemption order, filed by the petitioners in said investigation, was, by order No. E7269 (TR p. 396, et seq.), denied without further hearing.

The question involved on this review is whether under the Civil Aeronautics Act the Board has any jurisdiction over the operations of petitioners as a nonprofit cooperative association of flower growers and shippers or as a nonprofit shippers' association.

In short, is Bay Area an indirect air carrier, as defined in § 1(2) of the Act, within the meaning of § 1 (20 and 21) of the Act?

Read together, these provisions provide, in effect, that an indirect carrier, engaging in air transportation, i.e., the carriage of property for compensation or hire as a common carrier, is subject to the jurisdiction of the Board.

This brings us to a consideration of petitioner's points of review (TR p. 425) which, in effect, goes to the question of the Board's jurisdiction over an operation such as has been demonstrated in this record.

Further question is raised on this petition as to the validity of the cease and desist order, E7139, as lacking in specificity in failing to define or designate the alleged acts, conduct and practices which the Board would have petitioner cease and desist from doing.

The concluding point or question involved is the abuse of the discretion of the Board under §1005(d) of the Act in denying rehearing or reargument and failing to stay the effective date of the cease and desist order pending the conclusion of the investigation in the renewal of part 296 in Docket No. 4947 and the conclusion of petitioner's application for exemption filed and to be heard therein.

SPECIFICATIONS OF ERROR.

I. The findings and conclusions of the Board that Bay Area has held itself out and continues to hold itself out to the public as a common carrier for compensation or hire and is an air carrier, as defined in § 1(2) of the Act, and is engaged indirectly in the transportation of property by air, are erroneous.

II. The order of the Board, dated February 5, 1953, Order E7139 is void for uncertainty in that it is not definitive of the acts, conduct and practices allegedly investing common carrier status on petitioner.

III. The respondent Board abused its discretion under § 1005(d) of the Act in failing, neglecting or refusing to stay its order under review during the pendency of an investigation in the renewal of part 296 of its Economic Regulations, assigned Docket No. 5947.

ARGUMENT AND AUTHORITY.

I. THE FINDINGS AND CONCLUSIONS OF THE BOARD THAT BAY AREA HAS HELD ITSELF OUT AND CONTINUES TO HOLD ITSELF OUT TO THE PUBLIC AS A COMMON CARRIER FOR COMPENSATION OR HIRE AND IS AN AIR CARRIER, AS DEFINED IN §1(2) OF THE ACT, AND IS ENGAGED INDIRECTLY IN THE TRANSPORTATION OF PROPERTY BY AIR, ARE ERRONEOUS.

While the first specification of error herein is essentially a question of law, behind it lies a determination of common carrier status according to the record herein, the essential elements of which are a general holding out of service to the general public indiscriminately for whomever wishes to use the service of Bay Area. If the operations of Bay Area do not meet this fundamental test, then whatever its operations might be deemed to be, it cannot be held to be that of a common carrier and necessarily cannot be held to be a common carrier air freight forwarder subject to Board jurisdiction. Under its Articles of Incorporation and other corporate restrictions and limitations demonstrated in this record, Bay Area cannot, has not and will not undertake to serve anyone, except members in good standing. Bay Area is neither capable nor

willing nor authorized to serve the general public indiscriminately nor all of the flower shippers and growers of flowers in the San Francisco Bay Area and peninsula, who may wish to use its service. As near as we can analyze the position of the Board herein, the facility or lack of facility to membership in Bay Area to a class of shippers was in some form determinative of this question. This is inverse reasoning and ignores the fundamental question as to a holding out of service to the public within the meaning of the rule, limited to the following:

> "However the results may be accomplished, the essential thing is that there should be a *public offering of the service,* or, in other words, a communication of the fact that the service *is available to those who may wish to use it.*" *Northeastern Lines Inc.,* 11 M.C.C. 179.

Even in cases where a particular public carrier has limited its service to a class or segment of the public there is still the essential requirement that the carrier must be willing to serve indiscriminately all members of the class. *Producers Trans. Co. v. Railroad Commission,* 251 U.S. 228.

Conversely, if the individual or party under inquiry, operates a continuing service of a highly specialized nature, and it invariably refuses its services to almost anyone who applies for it, and the service is definitely limited to an individual or a particular few individuals who contract with him, such person is not a public carrier. *Ace High Dresses v. J. C. Trucking Co.,* 122

Connecticut 578. The question of holding out a service generally and indiscriminately to the general public is ofttimes dispelled by a form of "specialization" as applied to the circumstances of the particular case.

In *Transportation Activities of M.T.Co. of Illinois,* 52 M.C.C. 33, the question of a determination of common carrier status was considered by the Interstate Commerce Commission, in which the question of a general holding out to the general public, based upon the elements hereinabove mentioned, was considered by the Commission. It was there said:

> "Specialization in respect to service may be evidenced (a) by the use of special equipment required by the commodities transported or adapted to the convenience of the shipper, (b) by the transportation only of certain commodities or of commodities the transportation of which requires the use of special equipment, equipment accessories, or specially trained personnel, (c) by the strict observance of shipper designated loading and unloading hours, or by other similar practices. On the other hand, specialization in respect of shippers served is evidenced or negatived by the number served, by the apparent ease or reluctance with which new contracts (shippers) are added either in replacement of lost accounts or in addition to accounts already served. It is indicated also by the allocation of certain vehicles to the exclusive use of certain shippers and by placing of shipper advertising on the vehicles used in its service."

The record in these proceedings clearly demonstrates the need for a specialized service, handling a highly perishable commodity, to-wit, flowers and decorative greens, by specially trained personnel, having a knewledge of the individual requirements of each flower grower and shipper, and which strictly observes member shippers' hours of loading and unloading, in keeping with their marketing condition as affected by harvest or production of flowers and as may be affected by the vagaries of time, distance and weather conditions. The close coordination between the member and the Bay Area Association on all phases of its service to such members, is further indicative of the "specialization" as announced in the *Midwest Transfer* case, *supra.* In this light, Bay Area is nothing more than a shipping department in behalf of each of the members individually.

On this rule of specialization and close coordination, we would like to refer to the language of the Interstate Commerce Commission in *N. S. Craig, Contract Carrier Application,* 31 M.C.C. 705, where the Commission stated:

> "The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper. Such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities or in the supplying of

> related non-transportation services, such as the assembling, placing or servicing of machinery. Or it may consist of nothing more than the devotion of all of the carrier's efforts to the service of a particular shipper, or, at most, *a very limited number of shippers* under a continuing arrangement which *makes the carrier virtually* a part of the shippers' organization."

While the Commission was considering a contract carrier operation in the *Craig* case, it was significant to note the precise language used by the Commission negativing common carrier status as dependent on the rule of specialized service, particularly in the case of the very limited number of shippers under a continuing arrangement which makes the carrier, as alleged, virtually a part of the shippers' organization.

In conclusion on this point, we respectfully submit that the express willingness and desires of a group of shippers and producers of flowers and decorative greens to band together to effect economies in transportation rates, costs and expenses is not solicitation within the meaning of the term. None of the witnesses called by the Enforcement Attorney could testify as to any overt act of solicitation by any of Bay Area's representatives.

Significantly enough, however, all discussions regarding the numbers of members of Bay Area took place prior to the institution of dues and assessment provisions established by the Board of Directors. This is hardly a showing of an offer to serve indiscrim-

inately any flower shipper who desires to use a service.

On the other end of the service in destination territory, the Board seemed to lay some emphasis on the status of the receiver of the shipment and the fact that in some instances the receiver absorbs the transportation costs, and held that such fact results in a holding out of service to receivers.

On one single occasion, a letter written by the executive secretary contained the following: "For the best service and the lowest charges, insist that your flowers are routed via Bay Area (no extra charge or hidden fee)."

It is not immediately apparent to us how a communication from a receiver to a shipper member of Bay Area, with whom he contracts for the sale, purchase or distribution of flowers on the open market, can in any way be attributed to an overt act of solicitation by petitioner. It is another way of stating that producers or marketers of agricultural or horticultural products in a bona fide attempt to arrange for the transportation of their own commodity, must be oblivious to economic conditions as reflected by communications from the people with whom they deal or contract. In any event, payment of transportation charges by the receiver or consignee, whether recovered from the seller as a member shipper or not, does not establish the service to be in behalf of the receiver-consignee.

It must be remembered that at no time do the shipments originate at the request of the consignees or so-called nonmembers to Bay Area. Until the shipments are delivered to Bay Area's drayman (Airport Drayage Co.), by the member shipper, Bay Area and its officers and employees have no knowledge whatever of the identity, wishes or desires of the intended purchaser or consignee. In its opinion and order under review, the Board adopted the reasoning of the examiner that since the receiver in the cases of C.O.D. shipments, whether straight or in consolidated movement, pays the transportation charges, including Bay Area's so-called advance charge *ipso facto* Bay Area is serving the consignee purchaser as an indirect carrier. Not only does this conclusion violate all concepts or principles of contract law, which requires a meeting of the minds, however slight, but it fails to recognize the principles of agency and the relative responsibility of the parties to such transaction.

This determination of the true relationship between the association and its members, was the crucial point of determination in the *Pacific Coast Wholesalers Association, et al. v. United States,* 338 U.S. 689.

In that case, the contention was made that the legal obligation to pay the freight charges in the case of certain of the shipments, rested on the non-member consignor to pay the full less-than-carload rate rather than the consignee, who was the association member. From this reasoning, the Interstate Commerce Commission held that the difference between the rate paid

by the non-member and the carload transportation cost was profit to the association and that "the association was thereby holding out its service to the general public." In this view, the Commission concluded that the operation was that of a freight forwarder subject to regulation under the freight forwarder act.

The District Court reversed the Interstate Commerce Commission on this question. It considered as decisive that no shipment by the association was ever undertaken except at the behest of and for the benefit of one of its members. Looking to the agency between the member and the association rather than between the buyer and seller, the court saw no reasonable ground for ruling that the association *was on a profit basis* or that it *was holding its service out to the general public.* With this conclusion, the Supreme Court of the United States agreed and held:

> "When this principal-agent relationship between member-purchaser and the association is borne in mind, it is clear that there is no profit to the association from the activity described in the Commission's report, and it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to * * * provide transportation of property * * * for compensation.'"

The Supreme Court, following this decision, held:

> "Looking to the agency between the member and the association, rather than that between buyer and seller, the court (below) saw no reasonable grounds for ruling that the association was on a

> profit basis, or that it was holding its services out to the general public. We agree."

The following language, in the opinion of the District Court in that case, is particularly enlightening:

> "The existence of this agency, is implicit in the findings of the Commission. The report states that 'all of the shipments involved are consigned upon instructions of the members of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal, instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.' "

Petitioner respectfully submits that on this fundamental question of common carrier status, Bay Area does not hold out any service indiscriminately to the general public for compensation or hire; that its operations do, in fact, involve a "specialization" inconsistent with common carrier status, as to service, commodity and shippers, which is limited in its scope and number, and that petitioner does not assume responsibility for the transportation of member shipments from point of receipt to point of destination.

From a reading of the testimony of the member shippers from the president of the association on down, that appeared and testified in this proceeding, one fact stands out very clearly, namely, that in the event of loss or damage to shipments of flowers, the member does not look to Bay Area for any satisfaction whatever. Bay Area will assist such member at his request in processing a claim for loss or damage to the responsible carrier and nothing more.

Since on the authority of the Supreme Court of the United States in the *Pacific Coast Wholesalers Association, supra,* the status of the non-member consignee or receiver is irrelevant, it necessarily follows that in seeking to ascertain wherein any responsibility lies, we must of necessity consider the relationship between Bay Area, the nonprofit association, and its members alone.

As regards nonmembers, or even as regards strangers to the association a declared nonresponsibility would be unavailing, if, in fact, such service were rendered in behalf of such nonmember or stranger to the association. This for the very obvious reason that an *undertaking* to serve such parties carries with it the concomitant result of legal responsibility, whether assumed or disavowed or not; and herein is the crucial determining factor in this proceeding, found in the very context of the Act itself, in § 401(a) and paragraph 296 of the Board's Economic Regulations thereunder, which fixes the "air freight forwarder" with common carrier status in providing as follows: "In the ordinary and usual

course of his *undertaking* * * * (b) (he) assumes responsibility from the point of receipt to point of destination * * *"

If, as concluded by a Supreme Court, in the *Pacific Coast Wholesalers Case, supra,* a shipper's organization, such as Bay Area, cannot be held to render a service in behalf of a non-member, we fail to see wherein Bay Area has *"undertaken",* whether expressly or whether implied by law, to assume any responsibility to such non-member and fail to see on what basis, as established in this record, the consignee in such case could fix responsibility in his favor as against the petitioner. We submit, therefore, that there is no sound or valid basis for the conclusion by the Board that the petitioner bears or has assumed any responsibility whatever, other than that of principal and agent, in the handling of its members' shipments from point of receipt to point of destination, and that the conclusion of the Board in this repsect is contrary to the record and against law.

II. THE ORDER OF THE BOARD, DATED FEBRUARY 5, 1953, ENTERED HEREIN, ORDER NO. E7139, IS VOID FOR UNCERTAINTY IN THAT IT IS NOT DEFINITIVE OF THE ACTS, CONDUCT AND PRACTICES ALLEGEDLY INVESTING COMMON CARRIER STATUS ON PETITIONER AS TO WHICH IT SHOULD CEASE AND DESIST.

The cease and desist order entered herein (TR p. 389) has only one paragraph No. 1, which is in any way directive or prohibitive and provides as follows:

"IT IS ORDERED that:

1. Consolidated Flower Shipments, Inc.—Bay Area, its successors and assigns, and John C. Barulich, its executive secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of § 401(a) of the Act * * *".

It is petitioner's contention that without specification of the alleged illegal activity which would constitute violation of § 401(a) of the Act, petitioners have not been informed and, as hereinafter developed, are unable to ascertain specifically what acts or practices or conduct in the operation of petitioner as a nonprofit cooperative association is deemed in violation of § 401(a) of the Act by the Board.

It is noted that the order was issued "upon the basis of such opinion and the entire record herein," which presumably has reference to the opinion which bears the same serial number, E7139, dated February 5, 1953, which is part of the record herein pursuant to stipulation.

Review of that opinion, on page 3 thereof, discloses the following language:

"Upon the basis of the Examiners' findings and conclusions, we are satisfied that Bay Area is a common carrier for compensation within the meaning of the Act."

An analysis of such a holding, as indicated in the footnote to the opinion on page 3, seems to be as follows:

"(a) The fact that Bay Area was, during the conduct of the investigation and the proceedings below, reincorporated as a nonprofit cooperative association act under the Agricultural Code of the State of California, is irrelevant and immaterial, in the view of the Board.

(b) Bay Area holds out a service to shippers i.e. members, or consignees, particularly with respect to consignees as reported by the Examiner on page 11 of his opinion, which the Board adopted in its opinion and order."

Petitioner submits that the last two items find no substantial support in the record and moreover, is contrary to the direct evidence in the record, as argued in the earlier portions of this brief.

In any event, assuming for the moment, a conclusion which we vehemently deny, some particular practice, procedure, operation or conduct on the part of Bay Area, in the performance of its services to its members is in the view of the Board in violation of § 401(a) of the Act, procedural due process, particularly notice, is not accorded to petitioner unless the cease and desist order in itself is particularly definitive of the acts and conduct which the Board would have Bay Area discontinue.

At best, the cease and desist order is merely a written declaration of the policy of the law as stated in the Act and merely directs Bay Area to observe the law, a function which the petitioner has assiduously endeavored to accomplish from the very beginning.

A mandatory order, such as here involved, should be sufficiently definite and certain to inform respondents or petitioner against whom it is directed, what is required to be done, so as to enable the Courts in proper cases, and if need be, to enforce them. *Illinois etc. Co. v. State Public Utilities Commission,* 245 U.S. 493.

So, a cease and desist order of an Administrative Board, which, when judicially construed the courts may be called upon to enforce by contempt proceedings, must, like the injunction and order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. *National Labor Relations Board v. Express Publishing Co.,* 213 U.S. 426.

In the latter case, the court was construing an order, which in effect, as in the instant proceeding, required an employer to refrain from violating the Act in any manner whatsoever.

In the niceties of the complex questions and issues involved on such a subject, petitioner respectfully submits that without clear and precise specification of the acts, operations and practices upon which the Board would hold that respondents are engaging indirectly in air transportation, or are in violation of any provisions of the Act, the order to cease and desist herein, upon the authorities cited, is erroneous and incapable of proper interpretation or application at all events. The least that can be said for the cease and desist order entered herein, is that the Civil Aero-

nautics Board is not willing to accept the sound and reasonable proposition that a nonprofit cooperative association of shippers, handling shipments for themselves on a nonprofit basis, as demonstrated in this record, are not common carriers, but in any event must be subservient to the Board's jurisdiction, and must, in the view of the Board, assume the status of a common carrier by applying for a letter of registration and thereby subject itself to Board jurisdiction and regulation under the Civil Aeronautics Act.

It is respectfully submitted that unless Congress intended such a result to follow from the enactment of the Civil Aeronautics Act at a time when both administrative rulings and opinions of our Appellate Courts have formally passed upon the question of common carrier status in an operation such as this, such a conclusion by the Board is not only erroneous on this record, but contrary to law.

The only answer of the Board to this objection, as contained in its opinion E7269, TR p. 396, issued on the Petition for Reconsideration, was that in the instant proceeding "It is inconceivable that, after a full hearing in which they participated vigorously and after the issuance of a detailed *opinion* respondents should be unaware of the practices and conduct which constitute engaging indirectly in air transportation."

We have carefully and conscientiously read the opinion and order consisting of fourteen pages, including the appendix attached thereto, and excerpts from the initial decision of the Examiner, and are

frankly at a loss to know to which particular acts, practices and conduct the Board has reference.

If it is the manner in which the advance charge is assessed and collected, it would be a simple matter for the Board to so state.

On the other hand, it would be difficult to reconcile such a conclusion, if that is the conclusion of the Board, with the opinion in the *Pacific Coast Wholesalers,* case, *supra.*

If it be the distinction, if any exists, between arranging to handle shipments on a straight basis, rather than a consolidation basis, it would be a simple matter for the Board to so state. If it be the numbers or location of the member-shippers of Bay Area, it would have been a simple matter for the Board, in its discretion, to conclude that a membership of "twenty six" is not in violation but that a membership of "fifty" would be in violation. However, we are at a loss to determine any rationale for such a distinction and it beggars the degree and ignores the principle involved.

If it be the manner in which Bay Area has contracted for the performance of local drayage, delivery and terminal services it would have been a simple matter for the Board to so state and corrective measures and procedures could be inaugurated to meet any such requirement. It should be noted however that the Board has no jurisdiction over truck operations.

If it be a distinction between an assessorial charge for terminal services at origin point, as opposed to a

consolidation charge in behalf of the association, it would have been a simple matter for the Board to so state and corrective measures could be invoked to remedy the objection.

If it be the form and content of the Articles of Incorporation and By-Laws, with respect to purposes, authority and membership, or the various classifications of membership, it would have been a simple matter for the Board to so state and appropriate amendments to the By-Laws could be invoked (TR, John C. Barulich, pp. 271-274).

We could go on at length and endeavor to ferret out what, in the view of the Board is objectionable, and still could not feel secure against the charge of alleged violation of § 401(a) of the Act, under the form of the cease and desist order herein, *save and except the filing of an application for a letter of registration as a common carrier air freight forwarder.* It is respectfully submitted that the failure or refusal of Bay Area to apply for a letter of registration, is no answer to the fundamental question of jurisdiction over common carriers and the validity of the cease and desist order in its present form.

III. THE RESPONDENT BOARD ABUSED ITS DISCRETION UNDER §1005(d) OF THE CIVIL AERONAUTICS ACT IN FAILING, NEGLECTING OR REFUSING TO STAY ITS ORDER UNDER REVIEW DURING THE PENDENCY OF AN INVESTIGATION IN THE RENEWAL OF PART 296 OF ITS ECONOMIC REGULATIONS, ASSIGNED DOCKET NO. 5947, AND THE DETERMINATION OF AN APPLICATION FOR AN EXEMPTION ORDER OF PETITIONERS PENDING THEREIN.

The power of the Board under § 1005(d) of the Act is one that should be exercised pursuant to a sound discretion in the particular case.

Petitioners submit, that, as declared by the Board in its order serial No. E7140, Docket No. 5037, TR p. 390, "2. The application (for an exemption order) raises questions of such a complex and controversial nature, that they should be thoroughly explored in a full public hearing."

Further, there appears to be some question in the view of the Board, in its administration of part 296 of the Economic Regulations, as demonstrated by its opinion in Docket No. 5947, TR p. 406, et seq. as to any need or requirement for regulation of so-called shippers' associations and the extent to which there is or may be a general need for regulation of indirect air carrier services, including the type of services performed by Bay Area as a nonprofit cooperative association of shippers.

The Examiner ruled, and we submit erroneously (official TR p. 374 et seq.) that the application for exemption was not an issue in this investigation, and in refusing to consider the exemption application in

these proceedings the Examiner (TR p. 326) ruled that:

> "Regardless of the fact that even a cease and desist order might be issued in this case, that would be no bar to the Board's granting this respondent an exemption, or, in fact, be no bar to the Board's granting a letter of registration if the Board saw fit to do so. I am not speaking for the Board, you understand."

Yet, in another proceeding ordered investigated on the date of the issuance of the opinion and the cease and desist order herein, to-wit, February 5, 1953, the Civil Aeronautics Board denied petitioner's exemption application without prejudice to the renewal thereof, in Docket No. 5947, and instituted the investigation of Docket No. 5947 naming petitioner and ten other similar shippers' association as respondents, for the purpose of determining future policy and regulation under the Act.

Under the order of investigation, the Board referred to its holding in the instant proceeding, Docket No. 4902: "That a shippers' association *may* be an indirect carrier" (emphasis ours), and that in the light of such holding and the imminent expiration of part 296 of the Board's Economic Regulations, a thorough investigation is required with a view to determining a sound permanent policy for the future of indirect carriers of property and for the forwarder industry, and further indicating that inquiry of a formal nature is necessary to determine the extent to which there is

a continuing need, if any, for classification of all indirect air carriers of property.

The membership comprising the present nonprofit cooperative association of Bay Area, opinion and order E7139, p. 3, footnote 3, sprang from the voluntary initiative of flower growers and producers in the San Francisco bay area and has developed and grown into a closely knit and closely supervised association for their individual benefit.

The record herein is replete with the need of such an organization in the interests of the industry, banded together as it has in the Bay Area association, to obtain a competitive basis of flowers and decorative greens sold and distributed by the members in eastern markets. The sudden termination of Bay Area service, which, as evidenced in this record, comprises in excess of fifty (50) percent of the flower movement by air to eastern markets from this area, would have such an adverse economic effect upon the entire flower industry in this area as to result in irreparable loss and injury to the members and the industry as a whole (see petition for stay on file herein).

In these circumstances, which must be thoroughly explored before an order can be made on such exemption application, a cease and desist would work a grave injustice upon the Bay Area members and the industry they represent, if, on the conclusion of the investigation in Docket No. 5947, it be determined by the Board that the application for exemption is well founded and should have been granted in the public interest.

In advancing this ground and the adverse consequences which should result from the Board's order, if enforced, respondents are not unmindful of the fact that it has traditionally been the broad general policy of Congress in enacting related legislation affecting surface carriers (§ 402(c) of the Interstate Commerce Act), to exempt or exclude by whatever interpretation is deemed best appropriate such operations from the jurisdiction of regulatory Boards or Commissions, where such operation is exclusively devoted to the handling of agricultural, horticultural or farm products, such as flowers and decorative greens, by a non-profit shippers' association in behalf of its members.

Certainly no violence would be done to this policy of Congress; rather, the public interest would be served, if an activity devoted exclusively to the handling, shipping and distribution of such a highly perishable agricultural commodity as flowers and decorative greens, be held to be *exempted* or *excluded* from jurisdiction of the Civil Aeronautics Board.

Such a conclusion is in harmony with the opinion of the Board in the *Air Freight Forwarder* case, 9 C.A.B. 473, wherein the Board used the following language:

> "The term 'freight forwarder' is used loosely in common parlance to cover a wide variety of activities in connection with the handling of freight, *but will be used here* in its strictly technical sense, following the specific characteristics of a forwarder as set forth in Part IV of the Interstate Commerce Act. A surface forwarder *holds himself out to the general public as a transporter for compensation,* of property in interstate

commerce, assuming responsibility for the same from point of receipt to point of ultimate destination; he assembles and consolidated that property into bulk shipments which, at some terminal point, he breaks up and distributes; he uses the services of an underlying carrier for the whole or some part of the transportation of such shipments." (Emphasis ours.)

It is hoped that the Board will give due consideration to this policy of Congress in its conclusions in Docket No. 5947 and petitioner's application for an exemption order therein.

The point here made is that in the exercise of a sound discretion the Board should have stayed the effective date of its cease and desist order herein, pending the conclusion of the investigation in Docket No. 5947, and that its refusal so to do with the consequent result herein mentioned, constitutes an abuse of discretion.

CONCLUSION.

It is respectfully submitted that the findings and conclusion of the Board in its opinion and order herein and the cease and desist order entered herein, are erroneous and against law and that Bay Area does not hold itself out indiscriminately to the general public as a common carrier for compensation or hire as an indirect air carrier, as that term is defined in the Act; and, the order under review and the cease and desist order entered herein are void for uncertainty in not being definitive of the acts, conduct and

practices allegedly investing common carrier status in Bay Area; and that,

The Board abused its discretion in failing or refusing to stay its cease and desist order herein, pending a full and complete hearing and investigation in Docket No. 5947.

Wherefore, petitioner respectfully prays that this Honorable Court set aside and annul said cease and desist order, or that the order of the Board herein be set aside and the cause remanded to the Board for further hearing and investigation in connection with its said proceedings in Docket No. 5947, and petitioner's application for an exemption order filed therein.

Dated, South San Francisco, California,
January 25, 1954.

Respectfully submitted,
ANTONIO J. GAUDIO,
Attorney for Petitioner.